Checks and Balances: an Assessment of the Institutional Separation of Political Powers in Colombia

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FEDESARROLLO

WORKING PAPERS SERIES . DOCUMENTOS DE TRABAJO

Agosto de 2000 ● No. 17

This Version, June 2000

CHECKS AND BALANCES: AN ASSESSMENT OF THE INSTITUTIONAL SEPARATION OF POLITICAL POWERS IN COLOMBIA*

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Abstract

In this chapter, we evaluate the institutional and legal structure of the Colombian government. In particular, we want to assess how a system of institutional checks and balances can be structured to promote the rule of law, preserve property rights, and stimulate economic growth. The 1991 Constitution indeed makes commendable commitments to these objectives. Yet, due to its institutional structure, Colombia is governed in a manner that is both unchecked and unbalanced. The Constitution tried to «constitutionalize», or put into the basic law of the land, a welfare state system that emulates that of Canada or Sweden. Yet, neither of these countries has deemed it necessary to put such rules into the constitution of their countries. The result was an enormously long document that attempted to reassure all parties that the future would be to their liking. For example, Article 58, which permits uncompensated expropriation for reasons of «equity», might be a substantial deterrent to investment. Our examination of the Constitution of 1991 sounds a warning about the current peace process. The nation's long run economic health may be seriously impaired if peace is bought at the price of widespread concessions with regard to either the process of decision-making about the economy or to the content of future government economic policies. One may buy transitory tranquility, which may not translate in to lasting peace, at the price of long-term instability and turmoil. The implied tradeoff may be most undesirable. We make recommendations for institutional reform, which aim to mitigate clientelist and populist trends in Colombian politics. An overall smaller congress is suggested. To enhance policymaking by reducing the scope for gridlock, we propose measures such as long-term appointments and ballot accountability that eliminate distortions to the voting incentives of both judges and lawmakers. Also, suggestions are made to promote citizen referendum initiatives, specialized courts and executive agenda setting powers. Finally, procedures are set forth to limit undue deliberations by the judiciary and to induce stability through status-quo bias.

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* We are grateful to Alberto Alesina, Alberto Carrasquilla, Ignacio Donoso and Alan Hamlin for very helpful comments. We also thank Carlos Amaya and Ethan Cohen-Cole for research assistance and suggestions.

Policy Recommendations

- *Establish a clear hierarchy of decision-making across the three systems of courts (Constitutional Court, Supreme Court, and Council of State) such that decisions may be appealed upwards in the hierarchy and such that decisions of a higher court in the hierarchy are binding on courts lower in the hierarchy.*
- *For the Constitutional Court to overturn a law passed with the agreement of the President and Congress should require a supermajority vote of 7 of the 9 members.*
- *Modify article 253 of the Constitution to make members of the Constitutional Court, the Supreme Court, and the Council of State life appointees.*
- *Modify articles 231 and 239 to have judges in the high courts nominated by the executive and confirmed by the Senate. In article 240, eliminate the prohibition of holding another high court judgeship within one year of appointment to the Constitutional Court.*
- *Within the court hierarchy, create specialized courts for economic matters, such as taxation and bankruptcy.*
- *Modify articles 154 and 163 to give the president "fast-track" powers to submit unamendable propositions for urgent matters of economic policy to the Congress.*
- *Eliminate secret voting in both Congress and the three high courts except on matters relating to organized crime.*
- *Revise Article 171 such that the size of the Senate is reduced from 102 to 51 members.*
- *Revise Article 176 such that the size of the Chamber of Representatives does not increase from its present size of 165*
- *Private citizens collecting signatures of 5% of the electorate can initiate national referenda on legislation and constitutional changes. (At present, article 375 allows citizens only to propose changes to Congress).*

I. Introduction

In this chapter, we evaluate the institutional and legal structure of the Colombian government. In particular, we want to assess how a system of institutional checks and balances can be structured to promote the rule of law, preserve property rights, and stimulate economic growth. The institutional structure must acquire widespread popular legitimacy and be conducive to widespread human capital formation and participation in the benefits of growth to be sustainable in the long run. To further these objectives, we recommend, on the basis of the analysis below, the policy recommendations set forth on the previous page.

The 1991 Constitution indeed makes commendable commitments to these objectives. Yet, due to its constitutional structure, Colombia is governed in a manner that is both unchecked and unbalanced. Here are some examples:

- Articles 356 and 357 of the Constitution of 1991 commit the central government to a rigid schedule of increasing redistribution of tax revenues to departments. This schedule cannot, in principle, be checked by events -the functions of national defense and internal security may require the central government to have a higher share of revenues in a recession- or experience -functions with cross-departmental externalities, such as environmental regulation, might be better pursued by the central government. At the same time, the Constitution does not provide for balances that lead the departmental governments to fiscal responsibility. The departmental governments can have unbalanced budgets and run fiscal deficits with the expectation of a bailout by the central government. (See chapter xx of this volume).

- The Constitution, partly out of an unbalanced commitment to equality of results rather than equality of opportunities, has permitted the Constitutional Court to act in an activist manner in which it regularly overturns legislation passed with the assent of the President and the Congress. For example, the Court has blocked the deindexation of wages for public employees simply because pensions were indexed (by Article 53 of the Constitution). The Constitutional Court has also ruled against the government's policies relating to reform of bureaucracy, to the structure of interest payments on mortgages, and to differential taxes on consumer banking vs. inter-bank transactions[1]. In all cases the rulings can be deemed to have caused significant macroeconomic damage. More generally, the Court has gone beyond the normal check known as «judicial review» by overturning the Government's Development Plan and has largely usurped the normal executive and legislative direction of economic policy (e.g., dictating conduct by the Central Bank, see chapter yy).
- The Constitution gives private individuals standing to contest legislation directly with the highest courts in the land. As a result, almost all legislation is contested. The Constitutional Court is free to pick and choose among the complaints. Often, legislation is overturned on narrow procedural grounds. The Court and the legislature are not evenly balanced because in part details of the internal organization of the legislature-such as requirements for debate- are incorporated into the Constitution. In contrast to most other nations, where internal organization is left to the discretion of the legislature, the inclusion of details about how laws are passed in the Colombian Constitution has in fact contributed to extraordinary intervention by the Court. It has become difficult for the government to anticipate which legislative acts will be sustained.

The Constitution of 1991 was negotiated as a means of ending internal strife. The former revolutionary group M-19, which turned into a populist party with overarching redistributive goals, had a major success in the popular elections for the Constitutional Assembly and received a big seat at the table. In fact, their party, Alianza Popular, had the highest proportion of delegates compared to any of the competing lists emanating from the fragmented traditional political parties. The result was an enormously long document that attempted to reassure all sides that the future would be to their liking by introducing article after article with explicit provisions for all, followed by a general disclaimer of possible inapplicability in extenuating circumstances.[2] The Constitution attempts to be a document of rigid micromanagement (such as mandating indexation of pensions, setting targets for inflation and the allocation of regional public expenditures) rather than one that establishes basic institutions for democratic decision-making in a dynamic world. Moreover, written at the time when many nations in the world were emerging from state socialism and moving to market capitalism, the Constitution commits and creates expectations of a welfare state. In fact, such emphasis runs orthogonal to the market-oriented economic reforms introduced the same year by the government. Specifically, chapter II, Article I, "Economic, Social and Cultural Rights" creates expectations for subgroups

[1] Low taxation on inter-bank transactions aids a smooth flow of money in the economy since frictions in the systems of payments could bring the economy to a grinding halt by causing a liquidity crisis.

[2] This is an extreme manifestation of a general trend. Mueller (1996), Chapter 21, finds that newly drafted constitutions in recent years have not resulted in the governmental structure and rule of the game best suited to yield long-term welfare but rather have been geared to satisfy the short-term interests of the politicians who controlled the constitutional conventions. This is consistent with the findings by Shuggart (1998), who models political transition and finds that reform will result in an equilibrium favoring the constituencies of incumbents.

in the society such as the handicapped, children, and senior citizens. But Colombia, with a per capita income of US$2600, cannot possibly emulate Sweden or Canada. In contrast, such text is not found in the Canadian Constitution. [3] Meanwhile, the US Constitution asserts only that it seeks to "promote the general welfare". Worse, an overemphasis on neo-socialist egalitarianism can lead to widespread misery. For example, Article 58, which permits uncompensated expropriation for reasons of "equity", might be a substantial deterrent to investment.

Our examination of the Constitution of 1991 sounds a warning about the current peace process. The nation's long run economic health may be seriously impaired if peace is bought at the price of widespread concessions with regard to either the process of decision-making about the economy or to the content of future government economic policies. One may buy transitory tranquility, which may not translate in to lasting peace, at the price of long-term instability and turmoil. The implied tradeoff may be most undesirable.

In section II of the chapter, we provide a theoretical discussion of how government can be structured to provide checks and balances. Then, in section III, we discuss the major problems of Colombia and how our policy recommendations are designed to meet these problems. Next, Section IV explores the issue of institutional instability and in particular the nature of the executive-legislative relation. Section V follows up with an assessment of the balance of powers among the three branches of government and the operation of institutional checks. After that Section VI deals with the problem of concentration of power and the implications for the electoral system, while Section VII closes with conclusions and ponders further issues.

II. The Advantages of Checks and Balances

Democracy can lead, as de Tocqueville noted in Democracy in America, to a "tyranny of the majority" in which minority rights and preferences are given short shrift. For example, citizens can have short-run perspectives and use majority rule for redistribution. Too much redistribution can not only harm some individuals in the short run but also seriously affect the incentives necessary to promote long run growth. Moreover, in any political system, self-interested politicians will seek to extract rents. That is, any political system can offer plenty of opportunity for corruption. This is particularly present in Colombia where politics has traditionally been organized along clientilist lines, where the loyalties of politicians are to narrow interest groups, such as teachers' unions or localities, rather than being organized into broad coalitions formed around "ideological" parties.[4] In this section we discuss the theory behind the separation of powers as well as some crucial general considerations.

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[3] The most that the Canadian Constitution has is a provision allowing for affirmative action programs under certain circumstances (see article 15, Constitution Act, 1982, below). The Colombian Constitution tries to "constitutionalize" or put into the basic law of the land a welfare state system that emulates that of Canada or Sweden. Yet, neither of these countries has deemed it necessary to put such rules into the constitution of their countries. On the general powers of the federal parliament, see article 91, Constitution Act 1867, concerning the powers of the federal legislature: "91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." (N.B., See also Constitution Act, 1982: 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability).

A. The Theory about the Separation of Powers

The doctrine of the separation of powers is a basic principle within the liberal constitutionalist tradition. Some political philosophers have enshrined the separation of executive, legislative, and judicial powers as an important institution in order to prevent the abuse of political power by office holders.[6] While elections are a disciplining device, various political systems have different degrees of balance of power among the citizenry and the branches of government. The general presumption is that the separation of powers gives voters in liberal democracies a greater degree of control to discipline elected officials. If there is competition by division of powers among government agencies, say along geographical lines, agents can not only voice their opinion in the next elections but also exercise an exit option should they be dissatisfied.[6]

Recent political economy literature has assessed the impact of the separation of powers on the well being of citizens. Some have taken a skeptical stance with respect to the presumption that the separation of powers is an optimal arrangement. Brennan and Hamlin (1994, 2000) argue that in some instances the separation of powers may be detrimental in that a common pool problem may be induced leading to negative externalities between various branches or hierarchies of the State. Hence, checks and balances may cause a failure by the government to deliver to the citizens due to distributional conflict. Chari, Jones and Marimon (1997) explore this theme further by analyzing split-ticket voting among federal and decentralized agencies, in a static model with endogenous policy formation. In general, separation of the executive and the legislature will not guarantee an optimal outcome.

Alesina and Rosenthal (1996, 2000) show in a dynamic framework that bicameralism, federalism, presidentialism and other forms of separation of powers are beneficial as voters have more possible choices spanning the political spectrum. The voters can thereby obtain moderate policies even when the political parties are polarized. It is implicit that the judiciary will enforce that the bargaining process between the executive and the legislature is within the rules of the game. Also Persson, Roland and Tabellini (1997a, 1997b) show that the separation of powers eliminates political rents accruing from information asymmetry and abuse of power. In both cases, it is assumed that an independent and benevolent judiciary is capable of enforcing the constitutional rules, which provide checks through mutual agreement requirements and balances by distributing agenda control.

The assumption that the judiciary will perform its function without distortions is one that may not be appropriate in general, and especially with reference to the Colombian case. One of the main contributions of modern political economy has been the introduction of strategic behavior by politicians. Here we explore also the consequences of strategic behavior by judges, who may be politically and

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[4] A salient problem is where to draw the line between clientelist systems and interest group politics. On the one hand, interest group politics occurs in a framework of organized competition among many effective interest groups, thereby resulting in politicians' representation of varied interests. And, where extra-legal means are used, existing political institutions check such extra-legal means. On the other hand, clientelist politics is marked by politicians' expression of a limited number of interests based upon legal and extra-legal means of influence, and without checks or balances.

[5] To see the limits of this doctrine consider that the UK is a successful democracy without separation of powers between the executive and the legislative, or without a formal Constitution for that matter. The Magna Carta is not a declaration that fully specifies the political system. On the other hand, separation of powers makes more sense in the US largely because of the federal system. The legislature provides regional interests with a vehicle for checking the executive. The same seems warranted in Colombia, but it may have gone too far.

[6] Brennan and Hamlin (2000) use these two modes of response introduced by Hirshman (1970) to analyze the separation of powers.

economically motivated. A politically and economically motivated judiciary could result in a bad form of policy gridlock.[7] Gridlock can occur even when the judiciary does not intervene, but it will generally occur when there is not a large popular majority for policy change (Krehbiel, 1998, Brady and Volden, 1998). The bad scenario would be where a very unrepresentative judiciary blocks policy change that has been approved by the executive and legislative branch and has widespread popular consensus. Similar motivations could further reduce checks and balances by leading to a court with a weak enforcement capacity in ordinary cases.

B. General Considerations

1. Constitutional vs. Civil Courts

Whereas it has been noted that judicial power in constitutional matters has increased, courts ruling on administrative and criminal matters remain weak and impunity is rampant. Indeed, this is a worst case scenario where courts fail at their basic functions of enforcing human rights and property rights but intervene at the highest level of policymaking.

However, having a strong Constitutional Court may have positive effects since a judiciary weak in constitutional matters could leave the door open for covert collusion between the executive and the legislature. The problem is when the court decisions are beyond the realm of ruling about the legality of the dealings of governmental agencies and impinge more directly on the viability of policy implementation.[8]

2. How Much Change is Needed?

Clearly, there is need in change in the political system of Colombia in order to reduce pressures for short run redistribution, corruption, and clientilism. A central question concerns the extent of change required. It is doubtful that solely incremental change within the current system can achieve the desired goals. On the contrary, it is likely that fundamentally different institutions are required to attain political stability and economic prosperity. A closely related question concerns whether the changes can be limited to the formal governmental structure. Change in executive-legislative relations and in the structure of courts cannot be meaningful without addressing the fact that Colombia is faced with very significant extra-legal activity. In particular, those segments of Colombian society that identify with the insurgent political groups, both left-wing and paramilitary, must be included in the democratic process in order to achieve long-term stability. Also, we must consider the fact that the extensive extra-legal activity itself could be related to distributive conflicts stemming from limits to meritocracy, which are perpetuated by how clientelist interests shape political outcomes, and which are claimed to be at the heart of the origins of political violence.

3. There is no "One Best Way"

We approach our task with a large measure of humility. Numerous nations have by now attained a high level of economic development and a relatively high level of personal freedom and physical

[7] Spiller (1990), Gely and Spiller (1992), Spiller and Spitzer (1995) and Spiller and Tiller (1996) model how judges engage in strategic behavior, when they are politically and economically motivated.

[8] Hartlyn (1988) discusses various aspects of political coalitions in Colombia, including collusion.

security for their citizens. The institutions of government vary widely across these nations. In some, at best only recently have the executive and legislative branches of government been "checked" by an independent judiciary. In many, cabinet government prevails; and individual legislators are allowed little initiative in the policy process. In others, legislative dominance has been asserted. Similarly, there is variation in the independence of central banks and other agencies of economic regulation.[9]

These observations suggest there is unlikely to be "one best way", even for a given country. Even if there were "a best way", feasible change will be highly path-dependent. For example, the presumption that the separation of powers in government is the best way to achieve political accountability relies on the enforcement capacity and impartiality of the judicial branch. In general, many institutions designed to provide a check fail to work in the manner intended.[10]

4. Governmental Institutions and Separation of Powers

Checks and balances institutions that address the problems induced by simple majority voting include executive vetoes, bicameral legislatures, requirements for supermajority votes in some areas, and judicial review. All of these institutions induce bias toward maintaining the status quo over that found in majority rule. These institutions can also be used to design incentive systems that improve the accountability of politicians.

In general, if electoral control is imperfect, mutual agreement requirements and the agenda setting structure may be used to mitigate the concentration of political power. For example, accountability might be improved by allowing one set of political actors to decide on the size of a budget (level of taxation) and another to decide on how the budget is to be allocated across programs.[11] In practice, the separation of powers needs to be complemented by a division of powers. The latter establishes the distribution of political power among government agencies above and beyond the allocation of functions among the various branches of government furnished by the separation of powers.[12]

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[9] For example, there are dramatic differences in bankruptcy law and procedures in the UK and the US, even though these countries have relatively similar legal traditions and both are electoral democracies. See Franks and Sussman (1998).

[10] Here are two examples.

- The constitution of the French Fifth Republic provided for indirect election of the President of the Republic. The intent of the framers, principally Michel Debré, was to provide a conservative bias to the procedure. In fact, the members of the Electoral College had a conservative bias but were anti-Gaullist. Provision for direct election was made in 1962 through a referendum that amended the constitution.

- The bicameral US system was designed so that an indirectly elected Senate would balance a popularly elected House of Representatives. The House was to be elected every two years; the framers believed it would be too sensitive to swings in public opinion. The Senate was indirectly elected with staggered 6-year terms. Each state had two senators. This feature allowed the small states to «balance» the representation of the large states in the House. Indirect election was finally abolished in 1912. The framers had failed to anticipate a process of democratization, which included first removal of property restrictions on voting and later removal of racial and gender restrictions.
  In fact, constituency service and other features of the modern political system (see Fiorina, 1989, for example) provide House incumbents with a virtual lock on reelection. In contrast, Senate seats are less safe. The apparent explanation for the greater volatility of Senate seats is that senators run in statewide constituencies, making television marketing more cost-effective. It is easier for challengers to become visible and get their message across. We have applied this insight to our proposal to reduce the size of the Senate.

[11] See Persson, Roland, and Tabellini (1997a).

[12] See Brennan and Hamlin (2000).

5. Electoral Institutions and Political Parties

Accountability is also impaired by clientilist politics. Healthy political systems in Europe, North America, Australia, and New Zealand aggregate these interests not directly in the legislature but first in broad-based parties that are coalitions of interests. The legislative goals of these parties then represent packages of national policies. The parties become effective advocates for the interests of large groups in the public. At the same time, the institutional framework effectively checks extra-legal activity related to interest-group activity.

A cost of a party system is that the parties tend to become advocates for relatively extreme interests. In the United States (Britain), the Democrats (Labour) can be seen as advocating policies too favorable to labor and the Republicans (Conservatives) are too favorable to capital. But checks and balances can be and have been incorporated in the electoral system that allow voters to obtain more moderate compromises by creating divided government or by signaling, in by-elections, disapproval of current government policy. Such opportunities appear to be effectively used in the United States[13], France[14], Canada[15], and Germany[16]. Colombia itself currently has divided government with a Conservative president and a Liberal Congress. The problem is that the two parties have failed to articulate the interests of broader publics by aggregating interests to align policy.

6. Referenda and Initiative

When either legislative accountability or legislative responsiveness is weak, it may be desirable to counterbalance representative democracy with elements of direct democracy. The advantages of referenda are that the executive or legislature can leave difficult decisions to the public and that the result, having been decided by the public, will have greater legitimacy than a legislative action. The disadvantage is in the opportunity to frame the proposal in a manipulative manner. Initiatives are direct popular proposals. The advantage is that they enable majorities to go "over the head" of legislatures. A disadvantage is represented by our earlier critique of the "tyranny of the majority". Making it relatively costly -in terms of required signatures, for example- to place an initiative on the ballot can mitigate this disadvantage.

III. Colombia's Major Problems and Proposals for Institutional Change

In this section, we list the central political problems of the Colombian political system and discuss how our proposals aim to address them:

- An absence of physical security produced by a high degree of criminal activity throughout the society and armed guerilla and paramilitary units throughout much of the national territory.
- Traditionally, an absence of civilian control of the military. The absence of military intervention

[13] See Alesina and Rosenthal (1995), Scheve and Tomz (1999), Mebane (2000).

[14] See Alesina and Rosenthal (1995).

[15] See Erikson and Filipov (199x).

[16] See Lohmann, Brady, and Rivers (199x).

in recent years may result on the one hand from the military's ability to obtain relatively large budgets as a result of the physical security problem and, paradoxically, to possibly benefit indirectly from narco-trafficking. Thus, the military may lack strong incentives to deal with the first problem.

Tackling these first two essential problems is outside our assigned task. We do note, however, that these problems have had an undeniable impact on institutional performance. For example, the Congress has adopted secret voting in response to physical threats to its members. Secret voting also appears to be present in the high courts, where the results of the decisions, but not the votes of the individual judges, are disclosed to the public. Secret voting removes the transparency of political decision-making by reducing accountability of the legislature and the judiciary. It enables the political actor to engage in ex post credit claiming for decisions that turn out to be popular but to avoid responsibility for unpopular actions. Since judges as well as legislators have limited term appointments in Colombia, the courts as well as the legislature are faced with similar incentive problems posed by secret voting. With the exception of Latin America, secret voting is rare in national legislatures in democracies. Where it does appear, as in Italy, it appears to be related to government corruption and instability. Our proposal is to eliminate secret voting in areas that do not pose problems of physical security.

- The Colombian elite is relatively narrowly based. For example, there appears to be a strong element of family heredity in the presidency (e.g. three pairs of close relatives who were presidents: two Pastranas, two Lopez's, two Lleras's). The top levels of the government have a strong technocratic element. At the same time, as stated by the *Economist Intelligence Unit*, "ideological differences between the parties have all but vanished as both now support economic liberalism and some degree of federalism." In this situation, there is clearly a need for change such that the Congress can better represent the mass public.
- At present, Congress is clientilist in its orientation. As a result, it tends to impose «pork barrel» politics where policies are inefficient and rents are distributed to special interests. Executive proposals to improve efficiency and promote growth are either rejected outright or modified to promote inefficient redistribution. Alternatively, the executive is forced to make pork barrel concessions to members of the legislature. The executive has only weak countervailing power with respect to the legislature. It can challenge the constitutionality of passed laws through the Constitutional Court but it cannot veto laws on the basis of their content going against national interest. This reduces the scope for the executive to mitigate the attachment of special interest clauses to general laws. To overcome this limitation, our sixth proposal provides agenda setting powers to the executive by making possible the passage of urgent legislation through a fast-track procedure without modifications. The electoral reform proposals[17] in chapter zz of this volume and our proposals 7, 8, and 9 are also designed to attack the problem of clientilism. In addition, proposal 10 for popular initiative is designed to promote citizen action when the legislature is highly unresponsive.
- Even when the executive and legislature agree on legislation, the legislation is often struck down by the judicial branch. Unwarranted judicial activism is produced, in part, by the overly egalitarian expectations created by the Constitution and, in part, by the tendency to populism

[17] This may involve change of Article 263 in the Constitution, which establishes largest-remainder as the electoral system for choosing who is voted into office in multiple representative districts.

in the judiciary throughout Latin America.19 Institutionally, activism is promoted by the absence of structure within the judicial system. Our first proposal attacks this problem. Our second proposal, for supermajority decisions deals with activism directly. In other words, the executive and legislature are "innocent until proven guilty". Analogous to jury trials, where unanimity is required to convict, supermajorities of judges would be needed to overrule legislation. Our third proposal, for life tenure, reduces the political incentives to populism. At present, judges serve eight-year terms and cannot be reappointed. Moreover, our fourth proposal is that the executive and the legislature appoint judges in the highest courts to eliminate pressures for populism induced by self-recruitment in the judiciary. This would also eliminate the need for the prohibition of holding another high court judgeship within one year of appointment to the constitutional court. Our fifth proposal advocates the introduction of specialized courts for economic matters within the hierarchy of the judiciary.

IV. Institutional Instability and Executive-Legislative Relations

In this section we explore the roots of institutional instability and consider how the relationship among the president and congress have been affected. Colombia appears to have experimented with a very wide range of institutional structures. Since independence in 1810, there have been drastic constitutional changes in 1821, 1848, 1863, 1886, 1910, and 1991. Beyond the Constitutional Assembly of 1991, recently the constitution underwent other important modifications, as in the Constitutional Reform of 1936 or Article 120 in 1968. Also, important variations have occurred in the degree of decentralization of political power. There have been periods of two-party consensus, as in the National Front, as well as winner take all arrangements, with widespread redistribution of political control from the losing party to the winning party. Moreover, there were periods of military rule and also one-party dominance, as in the Liberal eras from 1930 to La Violencia and a military dictatorship in 1958. Within all these variations of the allocation of power, little has been done to foster and strengthen grass roots democracy. There are institutional barriers to democratization, such as the ban on military service for anyone with a high school diploma (NY Times, April 21). While military rule is obviously undemocratic, even the periods of consensus have largely concerned power sharing within narrow groups and the absence of social mobility into the governmental leadership.

A. The Roots of Instability

We observe that the Executive has since 1948 enjoyed great discretion and repeatedly bypassed the formal system of checks and balances, by assuming special powers during states of emergency.[19] One possible explanation would be that political elites have attempted necessary institutional reform but have been stymied by either localism or Liberal party dominance in the Congress, suggesting instability in coalition formation within the legislature that has led to executive exercise of discretion.

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[18] The populist tendency of Latin American courts is widely noted in a set of country studies on credit markets prepared for the IABD Buenos Aires conference, October, 1998.

[19] The French system is perhaps instructive here. Special powers were frequent in the 4th Republic, where the Parliament dominated and the Cabinet had weak or no agenda control powers. In the Fifth Republic, the Council of Ministers / President has taken over much decision-making power from "the governing princes" (to use Debré's term) and government has been both smoother and more legitimate at the price of being less open to individual initiatives.

However, the most common justification given historically for the declaration of states of emergency by the President has been to restore the rule of law and order, rather than override Congress.

Endemic violence has perpetuated to the point that its use as a political and economic asset in contemporary Colombia provides strong incentives for some groups to exit from the established democratic process. Hence, the salient features in this environment of institutional instability have been both the concentration of political power and the persistence of political violence.

The suspension of normal functioning of the judicial and legislative branches of government dictated by the frequent declaration of states of emergency has implied ample discretion for the executive branch and the military to exercise political control. During emergency periods, politics were run in an extremely centralized fashion with neither checks nor balances. Over time substantial increases in the defense budget were justified on the grounds of a situation nearing civil war. While the threat of a rebel takeover has never been imminent, interestingly, the extermination of political violence has been just as remote a possibility in practice. The persistence of political violence was a sustainable equilibrium until the last decade, before the alliance of the guerrillas with drug cartels raised the stakes. The end of the guerrilla movement would have eliminated the scope for the declaration of states of emergency and thereby would have deprived the executive of the benefits of the concentration of political power, and the military would have lost substantial resources. This is yet another example of how an institution designed to provide checks and balances, namely the declaration of states of emergency, fails to work in the manner intended.

In spite of both a secular decline in income inequality and real growth in the 1990s, the armed left-wing political movements remained strong. It has been difficult to co-opt the illegal opposition,[20] especially since the guerrillas have become allies of illegal drug cartels. These cartels have been able to operate in remote areas with local logistical support and protection. Such development has allowed the guerrilla to build an arsenal sufficiently strong to allow it to control over half of the municipalities in the country. At the same time, illegal paramilitary groups also provide services to illegal drug cartels. The stock of arms held by the illegal political movements has become a major political asset despite their apparent lack of grassroots support. In particular, the power of coercion is sufficient to make the guerrilla a political player to be reckoned with.

Over the last decade, the Government's inability to contain left-wing insurgent groups has been such that a tolerant, and some say even sympathetic, blind eye has been turned towards illegal paramilitary groups supported by the victims of guerrilla violence. The adoption of either military rule or emergency powers as an easy response to violence appears to have been successfully addressed by the 1991 Constitution. Colombia has had civilian rule, with emergency powers used solely for economic matters. Yet civilian rule has come at the cost that it has been nearly impossible to legislate reforms.

B. The Tension between Congress and the President

It is important to redress the balance of power between the executive and the legislature without going so far as the dictatorial situation of emergency executive powers. With respect to the operation

[20] Salient exceptions are the peace pact signed by the government with M-19 and the peace process in 1983 with FARC, which turned into the political party Union Patriotica. In the case of M-19, the pact absolved previous illegal activity by its members. In the case of FARC, there were widespread assassinations of those who sought legitimacy by gaining elected office; these assassinations sparked a return to insurgency.

of the legislature, we suggest, in our seventh proposal, that the secrecy of voting in Congress be eliminated as it hampers monitoring by voters of their representatives. With regard to the balance of power among the executive and the legislature, it is important to devise ways of breaking up gridlock that do not involve wholesale collusion as one extreme possibility or the complete suspension of judicial and legislative powers as another. Currently, the executive can challenge the constitutionality of passed laws through the Constitutional Court but it cannot veto laws on the basis of their content going against national interest. This reduces the scope for the executive to mitigate the attachment of special interest clauses to general laws. To overcome this limitation we propose, in our sixth proposal, the provision of agenda setting powers to the executive by making possible the passage of urgent legislation, without additions or modifications, through a fast-track procedure. This can limit the extent to which members of Congress force the executive into negotiations that result in the introduction of clientelistic clauses in unrelated laws.

Our proposal raises a big question: how much agenda-setting and amendment power remains in the legislature? Our recommendations are in line with changes elsewhere in the last half of the twentieth century. There is some trend toward reinforcing executive powers through "fast track" procedures in the US. The French system goes much further in this respect. At the same time, there may be a valuable "check" in the substantial oversight and investigative powers given to the legislature in the US.

Although both the French and US systems have substantial executive powers in comparison to pure parliamentary systems, they provide for voter balancing of the president through the creation of divided government or cohabitation. Persson and Tabellini (1998) show that this type of balancing in presidential systems tends to lead to smaller government with both less political rents and less redistribution than in presidential systems. Alesina and Rosenthal (1995, 2000) show that this type of balancing leads to more moderate policies than in pure presidential systems.

A valuable feature of divided government is that it can permit advocacy of opposing policy viewpoints and public debate. If on the other hand, divided government simply means a return to non-transparent negotiated settlements, as in the National Front era, divided government would not be desirable. Hence, political competition is a condition sine qua non for the separation of powers to induce less polarization and more political choice to voters. This requires stronger political parties and fewer candidates. Our proposals 8 and 9 as well as the electoral reform proposals of chapter zz push in this direction.

V. The Three Branches of Government

In this section, we discuss the three branches of government and provide details that support our main policy proposals. In addition, we discuss other areas where change would be desirable. While the separation of power is desirable, the division of power may be a necessary complement. The separation of power stipulates that the different branches of government be controlled by different agents. However, these agents may represent narrow interests if they all belong to the same party. Indeed, this is a likely outcome in democracies with one dominant party.

A. Executive

In Colombia, there has been a move from traditional bureaucracies to modern technocracies. But it is not clear whether this development has been accompanied by a sufficiently widespread rise in

meritocracy. In particular, the cabinet is increasingly composed of professionals trained abroad. The presence of «technocrats» in the cabinet could be represented as resulting from barriers to entry to less well-off segments of the population. Alternative modes of recruitment could give greater representation in the cabinet to individuals who have previously had substantial experience in elective office. In US parlance, "all politics are local". This reflects a need to build policy consensus as much from the grassroots up as from the top down. Therefore, technocratic trends in the executive should be viewed cautiously.[21] Certainly, apart from the cabinet itself, government officials should be rooted locally. This is done, for example, in the US with the regional Federal Reserve banks and with appointments of federal district judges, bankruptcy judges, appeals court judges, and district attorneys from local or regional bars.

A recent attempt was made by the executive to introduce reforms to limit the scope for corruption in public office. The proposed measures in the Reform of the State package aimed to incorporate transparency and accountability in the public management of resources. This legislative initiative was blocked in Congress, with the endorsement of the Constitutional Court. Also, special powers had been granted to the Executive to draft laws in this direction but their constitutionality has been called into question. This is another instance of recent rulings by the Constitutional Court, which have overturned Executive policy as unconstitutional. We could interpret this as a backlash against the historically observed unfettered self-attribution of special prerogatives by newly elected presidents.

B. Legislature

The Congress is bicameral with senators elected in a nationwide ballot and representatives to the Chamber elected in multi-member districts, both for four-year terms. In addition, the largest remainder system is used as the method of proportional representation. The system as a whole permits the election of members who have either narrow geographic bases, in the case of the Chamber, or narrow special interest bases, in the case of the Senate and the Chamber as well. This may mean that you get the adverse "pork barrel" consequences of local politics without the positive "grassroots" connotations. In this sense our proposals are for changes that would improve the representation function of the legislature.

There are many possible reforms to consider which would make the interaction between the Executive and the Legislature more productive. First, although we favor stronger agenda control powers for the president, it would be desirable to increase the oversight and information gathering capacity of the legislature in a way that permits the legislature to make constructive recommendations on legislation. Second, with regard to the general theme of corruption, legislators should be insulated from illegal influences through campaign finance reform. Third, there should be a reduction in the size of the Senate, which is the largest upper house in the Western hemisphere (Culver, 1999, p.14). Large legislatures have been seen as simply a source of employment for party apparatchiks (see Culver, 1999, p. 6).[22] There should be a check in the form of a strong status quo bias against tinkering with the size of the legislature and the electoral system.[23] This point is of particular importance given the extensive degree of corruption that has been documented to be taking place since the 1990's in both

[21] We note that we live in a world with rising expectations of democratization. Citizens of nations are increasingly skeptical of meritocracies such as the "ENArques" in France.

[22] Voters are sensitive to this and when given the choice, as in Illinois in 1953, have voted to reduce the size of legislatures.

the Senate and the Chamber of Representatives. Fourth, provision should be made to limit the expansion of the Chamber of Representatives rather than, as in the current Constitution, allowing for expansion with population increases.

Recent episodes show the benefits of improving the oversight role of the legislature could extend to dealing with corruption as well as to improving the quality of legislation. With regard to the scandal for misuse of funds in Congress this year the Attorney General, Mr. Alfonso Gomez, has said on March 25th 2000 that "in general, there are three types of responsibility: disciplinary, penal and political. Oftentimes it is more important to enforce political rather than penal responsibility. It is the lack of political control that facilitates corruption because timely political control can avoid dozens of penal processes." This sounds like an argument to improve self-policing in the legislature. It is indeed remarkable that it was President Andres Pastrana himself who had to call for resignations at the top of Congress, rather than fellow legislators. Given the overwhelming evidence, the legislators had to bow to the executive. It is perhaps even more remarkable that when the threat of recall of the whole Congress became likely, Congress fulfilled its oversight role and uncovered inappropriate conduct by senior cabinet members, who have since resigned.

After the majority support in Congress was lost, the executive questioned the integrity of the whole Congress on the grounds of corruption at the top, and in particular proposed to revoke the terms of all members of Congress. In response, Congress fended off such prospect by proposing that the President's term be revoked on exactly the same grounds. This indicates that the problem of impunity may be partly driven by lack of incentives to bring out information about corruption rather than lack of efficiency in the part of those who should find such information, in particular the legislature and the Comptroller General of the Republic. Our proposal 4, limiting the scope for concessions to the legislature for the executive to pass laws, could enhance mutual control by the branches of government.

C. Courts

The introduction of the Constitutional Court in 1991 has triggered a long struggle within the judiciary against both the highest criminal court and administrative court, namely the Supreme Court and the Council of State. Since 1992, the Constitutional court has repealed many rulings by the other high courts. One of the roles of this Court is to identify covert collusion among the executive and legislative branches, or constitutional mistakes, in the process of law enactment. Unfortunately, Colombia appears to have a problem from activist courts that intervene too frequently. This is in fact part of a trend throughout the world where courts are becoming more independent and intervening to oppose government policies.

Activist courts may make decisions that do not reflect widespread consensus and thereby engender long-standing conflict.[24] Activist courts also encourage the use of lawsuits to produce policy changes that groups cannot accomplish via the usual legislative process. There is a tradeoff between

[23] A classic example of the «employment» motive is the enlargement of the French lower house and a shift from single-member districts to p.r. by the French Socialists just prior to their certain loss in the 1986 elections. It is perhaps best to fix the electoral system in the Constitution, removing any incentive for the outgoing legislature to adjust the system for short-run political advantage.

[24] For example, court-ordered busing to aid school integration and court-ordered equalization of student spending are two examples from the US. In some states, voter recall is a check on activist courts.

activism to protect minority rights but going against majority opinion. One negative consequence of activism is an increase in uncertainty, which, in turn, acts as a disincentive to investment. Sometimes the courts should have purely negative impacts on government policy, thus leading to more status quo bias. Other times they should actively legislate, as has been the case in the US occasionally. In the case of Colombia, activism seems to have gone out of bounds in the sense that while the overall justice system is in a precarious state, resources are being devoted to overturn economic policies on dubious constitutional grounds. The judiciary should be more active in enforcing existing laws on crime and corruption and less active in the lawmaking process.

In Colombia, the way in which the higher courts are organized and the manner in which the magistrates are chosen imply that magistrates have very much the same incentives as politicians. The magistrates are selected by peers and by the executive for relatively short periods of eight years and without the possibility of reelection. For one year before being selected as a magistrate an individual cannot be a judge. This limits the scope for the members of the higher court to be chosen in the context of their career progression. Potential candidates have to find activities and means of support during the period before they are selected by the executive, the Council of State, or the Supreme Court. Also, after having served in the higher courts, while they cannot be reappointed, magistrates can hold public office after one year. The short span of career of a high court judge should make them prone to render short term, populist decisions. Moreover, the populist character of the judiciary may be reinforced by even the high courts being self-recruited from within the judiciary.

The way in which the Constitution is written indeed gives the Constitutional Court ample leeway to interpret laws. The diversity in the elected Constitutional Assembly that drafted the 1991 Constitution did not lead to an agreement on rules and procedures with the view that lawmaking would reflect the preferences of citizens without infringing upon the rights of minorities. Indeed, the Assembly failed to agree on general principles to facilitate political and economic decision-making. Instead of resolving differences, all sorts of interests were protected in hundreds of articles, which made unrealistic promises to all groups in society. This means that any law can be challenged as unconstitutional by some group that loses out. It is up to the Constitutional Court to decide which of the thousands of complaints it processes. But as the actions of individual magistrates are in the public domain, incentives are clearly biased towards populist decisions as a magistrate's term nears its end.

In terms of the structure of the higher courts, the main changes require constitutional amendments. A couple of modifications that do not require changes of the constitution relate to the number of members of the Constitutional Court as well as the nature of the majority required. Law sets the number of magistrates. Lowering this number may induce status quo bias in the sense that, given the odd number of magistrates, a majority for a decision would require a higher proportion of supporters in the Court. Also, this would generate a concentration of power within the Court. Another way to limit the influence of the Constitutional Court in getting overly involved in influencing the lawmaking process is to require supermajorities in declaring laws unconstitutional, as we recommend in proposal 2. In this case, support for a decision would also require a higher proportion of supporters than before.

The main changes to the judiciary that would enhance the operation of checks and balances involve constitutional amendments. Article 233 of the Constitution stipulates that the members of the Constitutional Court be chosen, for a fixed eight year term without reelection, by the Senate on the basis of lists of three candidates provided respectively by the executive, the Supreme Court and the Council of State. The myopia that this induces distorts the magistrates' decision-making adversely. In particular, at the end of their relatively short-term there will arise a clear populist bias given that

a political career is a likely prospect for magistrates. We propose that the term in Court be lengthened. The actions of judges partly reflect relatively short horizons induced by 8-year nonrenewable terms. Longer terms would be desirable, and indeed we recommend life appointments in proposal 3. If the term were to remain fixed for some reason, one possibility is to allow for magistrates to serve more than one period.

Another source of inefficiency in the judiciary is the lack of a hierarchical structure among the higher courts as well an ambiguous division of labor among them. It should be well established which is the highest court in the land. The Constitution says that the Council of State may rule on some constitutional matters but it does not spell out which. Also, there is no explicit rule to resolve conflict in the decisions of the various higher courts. In principle, the Council of State should deal with administrative law and the Supreme Court with civil law matters. This is a valid division of tasks. But, it would be desirable to have a hierarchy among the courts that induces a clear process, as we recommend in proposal 1. At present any citizen can challenge laws on the basis of constitutionality and the court can choose to look at any complaint. Hence, any law can be challenged immediately and overturned if the majority of magistrates deem it unconstitutional. A process would be desirable in which the Constitutional Court is the last instance of decision-making within the judiciary.

One role for the courts is to check the executive-for arbitrary or capricious actions, for example- or the legislature-for unconstitutional legislation, for example. Another role, much more debatable, is for the courts to be a balance and to assume a legislative role when legislatures fail to act.[26] Legislatures, of course, can check the courts by passing legislation, which overrides court actions. Again, we need to think about appropriate hurdles. If we consider the possibility of strategic behavior by the judiciary, the picture gets substantially more complex. We want for each branch to control the others without degenerating into a tit-for-tat game. This has happened recently not only among braches of government but also within the judiciary. For example, as already pointed out between the Constitutional Court and the other high courts there has been some gridlock in decision-making. Beyond the separation of power among branches clearer decision processes within branches are needed. The manipulation of administrative procedures can have very adverse consequences (McCubbins et al., 1987; Spiller, 1990). Our proposals aim to limit the adverse consequences of strategic behavior by judges through the elimination of short-termism and the introduction of a clear hierarchy among courts.

We also recommend in proposal 5 the creation of new specialized courts for economic matters, such as tax courts and bankruptcy courts, with judges who have received professional training in the relevant areas. Expertise in lower courts might reduce deleterious interference by the high courts, which may assume a populist political stance having very adverse effects on incentives.[26]

VI. The Concentration of Political Power and the Electoral System

In any liberal democracy elections are one of the most important discipline devices for voters to avoid abuse of power by policymakers. Checks and balances cannot be conceived in isolation of electoral

[25] One particularly distressing example of this relates to the Constitutional Court's attempt to dictate appropriate conduct by Banco de la República in its monetary policy stance.

[26] Kalmanovitz (2000) has documented decisions by the Constitutional Court about the way in which mortgage interests should accrue and with respect to the provision of public services that fly in the face of economic logic. Basically, it has attempted to impose actions inconsistent with budgetary feasibility not only on the central government but also on private sector banks by quoting paragraphs from the Constitution, which refer to fairness and citizens' rights.

institutions. In this section, we discuss direct democracy and electoral competition as ways of controlling politicians. Political competition provides further incentives for politicians to look out for the welfare of the citizenry and limit personal ambitions. Generally we should view the separation of powers and electoral competition as complements rather than substitutes. In Colombia, during the period of the National Front, collusion induced de facto concentration of political power although different agents performed separate governmental functions were. Persson and Tabellini (1998) show that majoritarian, rather than proportional, elections increase competition among parties by focusing into key marginal districts. The outcome yields fewer rents to politicians but more redistribution and larger government.

A. Direct Democracy: Referendum, Initiative, and Recall

Direct democracy, in addition to elections, represents an important means to check and balance the branches of government. Referendum is typically used to designate an institution where the government seeks popular approval for a particular policy or constitutional change. Initiative designates popular democracy on demand, where a vote occurs on the initiative of private citizens. Recall is an initiative used to remove an elected or appointed official, including judges, from office.

There are pros and cons on all three forms and wide variance in which they are used throughout the world. For example, Italy permits initiative to repeal laws but not to pass new laws. The motivation for referendum is that it allows governments to legitimate contested policies or to "pass the buck" to the voters. The motivation for initiative is to check special interest influence on government. Colombia allows for some direct initiative in presenting bills to the Congress, but this is different from allowing the voters to "go over the heads" of the legislature.

Some forms of direct democracy might make particular sense for Colombia if one accepts the claim that the government is too responsive to a relatively small elite. How direct democracy works is very dependent on the details. For example, the number of signatures that are required for an initiative is a crucial variable in determining the performance of this mechanism. Also, it is of importance whether separate elections are held or whether such issues voted on during general elections.

While details merit careful attention, Colombia, given the poor results from its current institutions, might do well to make more use of direct democracy institutions that are in fact widely used in other nations. National referenda are used frequently in Europe. Although there is no provision for direct democracy in the US constitution because it was a deliberately elitist 18th century document, referendum and initiative became popular at the state level in the US with the Progressive Movement at the end of the 19th century. In Switzerland, almost everything gets done by referendum, and major changes require not just a majority of the voters but also a majority of the cantons. This form of a "double majority" might be a way to give some guarantees to the FARC and other groups that have regional support.

B. Political Competition

Political competition itself may be the most important check in a political system. The standard prescription of economists is for a political system that has the rule of law, maintains property rights, and has minimal government intervention in the economy, and has economic policy-making, particularly with regard to central banks, that is "independent" of political influence. We need to specify in this framework the relevance of the principle: one citizen, one vote.

We would argue that political competition is essential in several respects. First, it may solve agency problems and reduce rent seeking and corruption that would be present in an unchecked political, even if technocratic, monopoly. Second, weighting citizens equally rather than by wealth creates advocacy for redistribution. Some redistributive policies may promote growth. Such policies would include investment in education that increases human capital formation among children from poor families, investment in health and nutrition for the same purpose, and bankruptcy policies that allow for fresh starts from economic failures. Third, when there are redistributive excesses, political competition creates advocacy for reforms that increase economic incentives. Colombia may need reform with respect to political competition.

Several facts hint that political competition is lacking. First, since the end of the military dictatorship in 1958, the Liberals have held the presidency for all but 14 years, and the Liberals now hold twice as many seats as the Conservatives in both houses of Congress. Second, as indicated earlier, there appears to be a strong element of family heredity in the presidency. More broadly, there should be a check on hereditary democracy or, alternatively, a removal of barriers to entry in political competition. Finally, many observers have noted a narrowing of policy differences between the two major parties. There are therefore some open questions: Is there a redistributive conflict? If not, the entire system may lack legitimacy. Is there adequate advocacy? Chapter zz on reform of the electoral system makes proposals addressing these points. In the Colombian context, there is a need to promote political competition, not only through checks and balances but other institutions as well, that serve the objectives of monitoring and advocacy in a way that, rather than degenerating into violence, aggregates conflict into consensus on long run policies.

VII. Conclusion

We have documented a need for the political system in Colombia to become both more competitive and more balanced. The competition should take place between broadly based coalitions rather than politicians with narrow clienteles. A more competitive system will probably require a broadening of governmental representativeness. At the same time, the judiciary needs to redirect its emphasis from populist rejection of government proposals on misguided norms of equality or equity, with short-run benefits for the disadvantaged but inflicting long-run damage, to enforcement of legislation dealing with crime and corruption.

Colombia, of course, has major problems connected to violence, guerilla insurgency, and military-civilian relations. Those problems are outside the purview of this chapter, but they impact on the functioning of institutions. For example, the threat of violence has led to secret voting in Congress and also has affected the functioning of the judiciary. More generally, the severe deterioration of law and order has fed back into institutional paralysis and has served to reinforce negative trends in relationships among the branches of government.

In the executive-legislative interaction, we observe a pattern that swings back and forth between extremely close cooperation and complete gridlock, with attempts by the executive to invoke extra-constitutional powers. With respect to the role of the judiciary in providing checks and balances, the presence of the Constitutional Court since 1991 has reduced the scope for potential covert collusion in law making and for the declaration of states of emergency by the executive. On the other hand, the Court has introduced very costly distortions by intervening in the legislative process. This is due to the incentives and feasibility for the magistrates to make populist decisions.

Nonetheless, even with a background of violence, we believe that Colombia can benefit from institutional change. The most important changes concern the judicial system. A clear hierarchy of

decision-making needs to be established, including courts specializing in economic matters. Judges need to be made independent by receiving lifetime tenure. At the same time, the judiciary needs to be checked by making appointments independent of the judicial system. Finally, the tendency of the courts to almost automatically override the executive and the legislature needs to be checked by requiring a supermajority of court judges to reject legislation.

Other essential changes concern the legislature. On most matters, secret voting should be eliminated. Clientelism needs to be curbed by reducing the size of the legislature and by changes in the electoral system. Clientilism and pork barrel bargaining can also be limited by giving the executive fast-track powers to make unamendable proposals. Finally, the legislature (and the executive) could be checked by popular initiative.

While well intentioned, the Constitution of 1991 has left Colombia with a diminished capacity to govern in a manner that promotes economic efficiency and growth. In the present crisis, the changes we have recommended merit serious consideration.

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